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No. 278. October Term, 1902.

IN THE

Supreme Court of the United States.

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JAMES H. McKENNEY

B. M. PATTERSON, EDWARD JANSEN, SVEN FREEMAN, E. THOMPSON, SIMON ANDERSON and KARL STEVENSON, Seamen,

Libellants-Appellants,

v.

The British Bark "EUDORA," Whereof ALFRED E. DICKSON is Claimant,

Appellee.

Certified from the United States Court of Appeals for the Third Circuit.

Supplemental Brief of Dickson, Claimant of Bark "Eudora," Appellee.

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IN THE

Supreme Court of the United States.

B. M. PATTERSON, *et al.*, *Appellants*,
v.
The Bark "EUDORA," whereof ALFRED E. DICKSON is master and claimant.

No. 278.

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SUPPLEMENTAL BRIEF FOR APPELLEE.

In reply to the brief filed on behalf of the United States, we desire to call the attention of the court to the following matters :

1. The interest of the government in this controversy is not clear. The action is not one to enforce the penal provision of the act, in which the government would properly be interested, but is one by certain seamen to recover compensation for services for which they have been admittedly already paid in full. It may be that the provision of the act granting double compensation to the seamen is invalid, although the penal provision may be valid. The right of the government to punish A for an attempt to pass counterfeit money upon B, is beyond question, but it would not necessarily follow because Congress

possesses power to declare that offence a penal one, it could also provide, that by reason of the attempt of A to pass counterfeit money upon B the former should be compelled to give all of his property or any part of it to B, although the latter had suffered no loss. This would clearly be a taking of the property of A without due process of law.

The Bureau of Navigation is not charged with the enforcement of this provision of the Act of 1898. If the penal provisions of the act are invoked the Department of Justice acts directly (see Brief of U. S., p. 7), while if the seamen attempt to recover double compensation the action is a private one.

The statement, therefore, that the Bureau of Navigation has decided the constitutionality of this provision by applying the law, as declared in the *Kestor* case, is interesting, but hardly conclusive, especially as we are advised that the act in question was largely prepared in the Bureau of Navigation. One would hardly expect that Bureau to declare the illegitimacy of its own offspring.

2. The brief of the government contains (page 2) a letter from the acting Secretary of the Treasury to the Attorney General, dated November 10, 1902. It will be seen that this letter is but part of the correspondence which had already taken place. It also refers to certain correspondence between the Ambassadors of Great Britain, Germany and France, and the State Department, as to the crimping and desertion of seamen from foreign vessels.

If any effect whatever is to be given to this correspondence, the full correspondence between the

Treasury Department and the Department of Justice and that passing between the State Department and the various ambassadors, should have been inserted, and not a mere fragment of it. It seems probable that if the correspondence of the British Ambassador with the State Department had been inserted that it would have shown that it had absolutely no bearing upon the payment of seamen's wages in advance. It seems incredible that the British Ambassador would have protested to the Department of State against the payment of wages in advance by the master of a British vessel, at an American port, when such payments are permitted by the express provision of the Merchant's Shipping Act of Great Britain.

3. The letter of the Acting Secretary of State contains some inaccuracies to which we desire to call attention.

It is stated that Section 24 of the Act of 1898 relates to the allotment of seamen's wages and is a measure to suppress crimping.

Section 24 of the Act of 1898 does not relate to allotments at all, as the acting secretary has assumed, but to the payment of wages in advance. Between the two there is a well recognized distinction.

Nor is Section 24 of the Act of 1898 a measure to suppress crimping. The influences and factors which brought about that legislation are well known in shipping circles, and it may be confidently stated that the purpose was not to suppress crimping. Even the context of the act so shows. It would seem incredible that Congress, with an intention and

desire to prohibit crimping, would impose a penalty upon the master of the vessel, who commits no offence, moral or otherwise, in paying wages in advance, and at the same time would make no provision for punishing the shipping agent, the very person the government argues is guilty of the offence of crimping.

The purposes of this legislation, however, are not important. The only question before the court is the power of Congress, and not one of policy.

4. It is argued on behalf of the government that because Congress can place an embargo on foreign commerce, that it can "clearly prescribe the conditons upon which foreign vessels may touch at our ports and enter and ship their crews in our ports" (p. 8). From this it is argued that "given this power to control and regulate the shipment of crews on foreign vessels in our ports, Congress must equally have the power to prohibit the advance payment of wages." It does not follow, as assumed by the government, that because Congress has the power to lay an embargo upon foreign commerce, that it has the right to regulate every contract of a foreign vessel in our port where no embargo is laid. It is well recognized that Congress has the power to absolutely prohibit foreign commerce, that is, the sale or interchange and the transportation of goods, if, in its judgment, such legislation is necessary to promote the general welfare of the people. This power exists, however, because Congress acts clearly within the scope and meaning of the term *commerce*, as defined by this court. But it does not follow that because Congress

may prohibit that which is actual commerce, that it may also regulate contracts, where commerce itself is not prohibited, made by the master of a foreign vessel while at one of our ports, which are not commerce but merely incidental thereto.

As Congress has not prohibited such commerce, the question resolves itself into one whether a contract of employment made at an American port by seamen for service upon a foreign vessel is commerce within the meaning and scope of that term as construed by this court. This question has been fully argued in our original brief.

5. The appellant argued broadly at bar of the court that this legislation could be sustained under the exercise of the police power by Congress and that position seems also to be taken by the government because it is said (brief p. 8): "In this case, the payment was made to a shipping agent in the port of New York, and was a police regulation which was within the power of Congress to pass."

It seems unnecessary for us to argue to this court in answer to that position that Congress possesses no general police power, as that power is reserved to the several states. It is true that where Congress possesses the power of legislation under the commerce clause, its power is plenary and is as broad in its scope as the police power of the various States. But Congress possesses this plenary power only where the subject matter of the contract is commerce, as construed by this court. This brings us back to one of the fundamental points in the case; that is, whether the contract entered into by the

libellants with the bark, "Eudora," was commerce or whether it was merely a contract incidental to commerce. If the contract is not commerce it must be conceded that it is not within the domain of congressional legislation.

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